

# EXHIBIT K

## **2004 NASD Rule Archives, Regulation, NASD 3370. Prompt Receipt and Delivery of Securities**

<http://prod.resource.cch.com/resource/scion/document/default/09013e2c85035108?cfu=Legal>

[Archive rulebook — NASD April 2004]

### **3370. Prompt Receipt and Delivery of Securities**

See Notice to Member 04-08 for information on a pending rule change.

#### **(a) Purchases**

No member or person associated with a member may accept a customer's purchase order for any security unless it has first ascertained that the customer placing the order or its agent agrees to receive securities against payment in an amount equal to any execution, even though such an execution may represent the purchase of only a part of a larger order.

#### **(b) Sales**

##### **(1) Long Sales**

No member or persons associated with a member shall accept a long sale order from any customer in any security (except exempt securities other than municipals) unless:

(A) The member has possession of the security;

(B) The customer is long in his account with the member;

(C) The member or person associated with a member makes an affirmative determination that the customer owns the security and will deliver it in good deliverable form within three (3) business days of the execution of the order; or

(D) The security is on deposit in good deliverable form with a member of the Association, a member of a national securities exchange, a broker/dealer registered with the Commission, or any organization subject to state or federal banking regulations and that instructions have been forwarded to that depository to deliver the securities against payment.

##### **(2) "Short Sales"**

###### **(A) Customer short sales**

No member or person associated with a member shall accept a "short" sale order for any customer in any security unless the member or person associated with a member makes an affirmative determination that the member will receive delivery of the security from the customer or that the member can borrow the security on behalf of the customer for delivery by settlement date. This requirement shall not apply, however, to transactions in corporate debt securities or transactions in security futures, as defined in Section 3(a)(55) of the Act.

###### **(B) Proprietary short sales**

No member shall effect a "short" sale for its own account in any security unless the member or person associated with a member makes an affirmative determination that the member can borrow the securities or otherwise provide for delivery of the securities by the settlement date. This requirement will not apply to transactions in corporate debt securities, to transactions in security futures, as defined in Section 3(a)(55) of the Act, to bona fide market making transactions by a member in securities in which it is registered as a

Nasdaq or ADF market maker, to bona fide market maker transactions in non-Nasdaq securities in which the market maker publishes a two-sided quotation in an independent quotation medium, or to transactions that result in fully hedged or arbitrated positions.

### **(3) Public Offering**

In the case of a public offering of securities, paragraph (b)(1) hereof shall not apply during the period from the commencement of the public offering until seven (7) business days following the date of settlement between the underwriter and issuer of the securities; provided, however, that the member believes in good faith that the customer has purchased the securities.

### **(4) "Affirmative Determination"**

(A) To satisfy the requirements for an "affirmative determination" contained in paragraph (b)(1)(C) above for long sales, the member or person associated with a member must make a notation on the order ticket at the time the order is taken which reflects the conversation with the customer as to the present location of the securities in question, whether they are in good deliverable form and the customer's ability to deliver them to the member within three (3) business days.

(B) To satisfy the requirement for an "affirmative determination" contained in paragraph (b)(2) above for customer and proprietary short sales, the member or person associated with a member must keep a written record which includes:

- (i) if a customer assures delivery, the present location of the securities in question, whether they are in good deliverable form and the customer's ability to deliver them to the member within three (3) business days; or
- (ii) if the member or person associated with a member locates the stock, the identity of the individual and firm contacted who offered assurance that the shares would be delivered or that were available for borrowing by settlement date and the number of shares needed to cover the short sale.

(C) The manner by which a member or person associated with a member annotates compliance with the "affirmative determination" requirement contained in subsection (b)(2) above (e.g., marking the order ticket, recording inquiries in a log, etc.) is not specified by this Rule and, therefore, shall be decided by each member. Members may rely on "blanket" or standing assurances (i.e., "Easy to Borrow" lists) that securities will be available for borrowing on settlement date to satisfy their affirmative determination requirements under this Rule. For any short sales executed in Nasdaq National Market (NNM) or national securities exchange-listed (listed) securities, members also may rely on "Hard to Borrow" lists indicating NNM or listed securities that are difficult to borrow or unavailable for borrowing on settlement date to satisfy their affirmative determination requirements under this Rule, provided that: (i) any securities restricted pursuant to UPC 11830 must be included on such a list; and (ii) the creator of the list attests in writing on the document or otherwise that any NNM or listed securities not included on the list are easy to borrow or are available for borrowing. Members are permitted to use Easy to Borrow or Hard to Borrow lists provided: (i) the information used to generate the list is less than 24-hours old; and (ii) the member delivers the security on settlement date. Should a member relying on an Easy to Borrow or Hard to Borrow list fail to deliver the security on settlement date, the Association shall deem such conduct inconsistent with the terms of this Rule, absent mitigating circumstances adequately documented by the member.

### **(5) "Bona Fide Fully Hedged" and "Bona Fide Fully Arbitrated"**

In determining the availability of the exemption provided in paragraph (b)(2)(B) above and in Rule 11830 from short sale requirements for "bona fide fully hedged" and "bona fide fully arbitrated" transactions, the following guidelines shall apply. These guidelines are for illustrative purposes and are not intended to limit the Association's ability to determine the proper scope of the terms "bona fide fully hedged" or "bona fide fully arbitrated" pursuant to this provision, on a case-by-case basis.

**(A) Bona Fide Fully Hedged**

The following transactions shall be considered bona fide fully hedged:

(i) Short a security and long a convertible debenture, preferred or other security which has a conversion price at or in the money and is convertible within ninety days into the short security.

Example: Long ABCD Company 9% convertible subordinated debentures due 2003. Each debenture is convertible into common at \$27.90 per share of common equal to 35.842 shares of common per 1M debenture.

- With the price of the ABCD at 8 3/4 -9 or 8.75-9 and a short position of 100 shares of ABCD the short position would not be exempt.
- If the price of ABCD was \$28 with a short position of 100 shares, 35 shares would be exempt and the remaining 65 shares would not be exempt.

(ii) Short a security and long a call which has a strike price at or in the money and which is exercisable within 90 calendar days into the underlying short security.

Example: Long 1 call of EFGH at a price of either 44 1/8 or \$44.10 with a strike price of 40 expiring within 90 calendar days.

- With the circumstances as above 100 shares would be exempt.
- If the strike price was 50 a short position of 100 shares would not be exempt.
- With any strike price and the call expiring in more than 90 days any short of the common would not be exempt.

(iii) Short a security and long a position in warrants or rights which are exercisable within 90 days into the short security. To the extent that the long warrants or rights are "out of the money," then the short position shall be exempt up to the market value of the long warrants or rights.

Example: Long 100 warrants of IJKL (IJKLW: 2 1/4 -2 3/4 or 2.25-2.75). Each warrant is exercisable into 1 share of common at \$2. (IJKL: 4-4 1/2 or \$4-4.50).

- With the circumstances as above a short position of 100 shares would be exempt.
- If the price of IJKL is \$1.50 and the market value of long warrants is 1/4 of a point, or \$.25, a short position of 16 shares would be exempt.

(iv) Short a security and long a single stock future of the underlying security.

Example: Long 1 single stock future of MNOP.

- With the circumstances as above (and assuming a contract size of 100) 100 shares would be exempt.
- Even if the expiration date for the single stock future was more than 90 calendar days, 100 shares would be exempt.

**(B) Bona Fide Fully Arbitraged**

The following transactions shall be considered bona fide fully arbitrated:

(i) Long a security purchased in one market together with a short position from an offsetting sale of the same security in a different market at as nearly the same time as practicable for the purpose of taking advantage of a difference in price in the two markets.

Example: Purchase 100 shares of EFGH on the London Stock Exchange and simultaneously effecting a short sale of 100 shares of EFGH on Nasdaq.

- Under the above circumstances, the 100 shares short would be exempt.

(ii) Long a security which is without restriction other than the payment of money exchangeable or convertible within 90 calendar days of the purchase into a second security together with a short position from an off-setting sale of the second security at or about the same time for the purpose of taking advantage of a concurrent disparity in the prices of the securities.

Example: Long 100 shares of MNOP (MNOP: 51-51 1/4 or 51.00-51.25) which is being acquired by QRST Corp. (QRST: 52 1/8 -52 3/8 or 52.10-52.30) at the rate of 1.15 shares per MNOP share.

- If the exchange is to take place within 90 days then a short of 115 shares of QRST would be exempt from the mandatory buy-in. Also, if the exchange was to take place at a date later than 90, all short positions in the above example would be subject to the mandatory buy-in.

(C) The transaction date of the short sale shall govern when a fully hedged or fully arbitrated position exists.

[Adopted eff. Sept. 9, 1968; amended eff. Sept. 1, 1972, Nov. 15, 1973; Oct. 15, 1986; Aug. 3, 1987; July 5, 1990; July 14, 1993; amended by SR-NASD-94-32 eff. Jan. 9, 1995; amended by SR-NASD-95-02 eff. Jan. 9, 1995; amended by SR-NASD-94-56 eff. June 7, 1995; amended by SR-NASD-95-38, Sept. 18, 1995; amended by SR-NASD-95-62 eff. Feb. 20, 1996; amended by SR-NASD-95-39 eff. Oct. 10, 1996; amended by SR-NASD-00-46 eff. Aug. 28, 2000; amended by SR-NASD-99-37 eff. June 9, 2000; amended by SR-NASD-2002-97 eff. July 29, 2002; amended by SR-NASD-2002-40 eff. Oct. 15, 2002.]

Selected Notices to Members: 86-69, 88-47, 90-51, 94-80, 95-36, 00-28.

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